No. _____

Supreme Court, U.S.
FILED

In The Supreme Court Of The United States

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OFFICE OF THE CLERK

OCTOBER TERM, 1998

VINCENT GENCARELLI,

Petitioner,

vs.

MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION, and CITY OF WORCESTER, MASSACHUSETTS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

PETITION FOR *WRIT* OF *CERTIORARI*

Shelli C. Hamer*
***Counsel of Record**
Henry J. Lane
LANE AND HAMER, P.C.
100 Main Street
Whitinsville, MA 01588
(508) 234-4400

LAWYERS PRINTING COMPANY 7th & Franklin Bldg Richmond,Virginia 23219 (804) 648-3664

QUESTION PRESENTED

Whether the petitioner was unconstitutionally deprived of the opportunity to raise the claim that a regulatory taking occurs when environmental regulations do not substantially promote a legitimate state interest, when the lower court ruled that the doctrine of collateral estoppel required him to raise the taking issue in an earlier case which had resulted in the order to begin the administrative process rather than allowing him to raise the taking issue at the conclusion of that administrative process?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

Vincent Gencarelli, *Petitioner*

v.

Massachusetts Department of Environmental Protection,
and City of Worcester, Massachusetts
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

Vincent Gencarelli respectfully petitions for a writ of certiorari to review the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts in this case.

OPINIONS BELOW

The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts is unreported and reproduced in Appendix A. The opinion of the Appeals Court for the Commonwealth of Massachusetts is unreported and reproduced in Appendix A. The opinion of the Superior Court is a handwritten note on the

Motion for Judgement on the Pleadings which states the following:

Order

> Motion of defendants for Judgment on the Pleadings Allowed after hearing. Judgment shall enter affirming the decision of the Department of Environmental Protection (Count I) and Judgment shall enter dismissing Count II.
>
> P.J. King
> 7/11/97

STATUTORY PROVISION INVOLVED

The Fifth Amendment to the United States Constitution states in part, "nor shall private property be taken for public use without just compensation."

JURISDICTION

The Supreme Judicial Court of the Commonwealth of Massachusetts issued an opinion denying the petitioner's Request for Further Appellate Review of this matter on March 30, 1999. This Court's jurisdiction is based upon 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

On August 22, 1989, the City of Worcester, Massachusetts filed an action in the Massachusetts Superior Court to enforce provisions of the Massachusetts Wetlands Protection Act. It alleged that the petitioner, Vincent Gencarelli, had illegally filled a wetland. The Superior Court concluded that the wetland had, indeed, been illegally filled and ordered Mr. Gencarelli to first file a restoration plan with the Worcester Conservation Commission and then proceed to restore the wetland in accordance with the plan. [1]

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[1] The final judgment in the original Superior Court action was affirmed in the Appeals Court in City of Worcester v. Gencarelli, 34 Mass. App. Ct. 907 (1992).

On February 2, 1990, while the action was still pending, Mr. Gencarelli anticipated the decision of the court and submitted a Notice of Intent (NOI) and a Wetlands Restoration Plan for the wetland. Mr. Gencarelli's wetland expert proposed that no further work be done since the filled wetlands were currently vegetated and removal of the fill would create erosion problems which would be more detrimental to the adjacent wetlands than leaving the vegetated slope in place. He also pointed out that activity on the site had resulted in newly created wetlands that were more than adequate compensation for the filled wetland area. The Worcester Conservation Commission declined Mr. Gencarelli's NOI and Restoration Plan in an Order of Conditions dated March 13, 1990.

On March 22, 1990, Mr. Gencarelli submitted a Request for a Superseding Order of Conditions to the Massachusetts Department of Environmental Protection (D.E.P.). Stating that the evidence that the wetlands were newly created was inconclusive, D.E.P. issued a Superseding Order of Conditions denying the proposed restoration plan on June 27, 1990.

Mr. Gencarelli, certain that he could present enough evidence to allow D.E.P. to conclude that there were indeed newly created wetlands on the site and that further disruption of the area would create more problems than it would solve, requested a formal adjudicatory hearing in July 1990. That hearing has not yet been held.

On September 6, 1994, after both parties had prefiled direct testimony, the Department filed a Motion to Dismiss based on two grounds, collateral estoppel and failure to sustain a direct case. The Motion to Dismiss was allowed on January 13, 1995, on collateral estoppel grounds. Mr. Gencarelli appealed the dismissal. The Superior Court reversed the decision and remanded the matter to D.E.P. to provide Mr. Gencarelli with "the full measure of administrative remedies that are available to everyone," stating that Mr. Gencarelli's contention that replication standards had been met was not an attempt to relitigate the prior Superior Court ruling that the fill had been placed illegally in the wetland and, thus, was not an impermissible collateral attack on the order of the Superior Court.

On remand, the motion to dismiss was granted for failure to sustain a direct case with a finding that the pre-

filed testimony failed to establish that recreated wetlands met regulatory "performance standards." Mr. Gencarelli appealed the dismissal to the Superior Court claiming that 1) the dismissal of his request for an adjudicatory hearing was not based on substantial evidence, was based on errors of law and violated constitutional provisions, and 2) the Department's failure to issue an Order of Conditions was an uncompensated regulatory taking. On July 16, 1997, the Superior Court affirmed the decision of the Department of Environmental Protection and the regulatory takings claim was dismissed. Mr. Gencarelli appealed that decision to the Appeals Court on August 12, 1997. The decision of the Superior Court was affirmed by the Appeals Court on February 9, 1999. The Appeals Court reasoned that:

> if Gencarelli believed that the order to restore the wetland constituted a taking, he should have raised that issue in the first Superior Court action, and having failed to do so, is precluded from raising that issue now.

Mr. Gencarelli then filed a Request for Further Appellate Review with the Supreme Judicial Court for the Commonwealth of Massachusetts on March 1, 1999, reiterating his claim that the collateral estoppel did not apply

in this matter since the regulatory taking issue could not be properly raised until the end of the administrative process and asking that the case be remanded to the Superior Court for a trial to determine whether the final decision of the Department of Environmental Protection enforcing its performance stan ards on Mr. Gencarelli's land had resulted in a regulatory taking. The request was denied on March 30, 1999.

REASONS FOR GRANTING THE PETITION

The Fifth Amendment to the United States Constitution states in part, "nor shall private property be taken for public use without just compensation." The Supreme Court has ruled that "(t)he application of a general zoning law to a particular property effects a taking if the ordinance does not substantially advance legitimate state interests..." Agins v. Tiburon, 447 U.S. 255, 260 (1980). This case is unusual because, unlike most regulatory taking cases, it does not involve restraints on development. But being free from the requirement to alter one's land would appear to be as much among the "bundle of rights" that is encompassed by land ownership as is the right to develop the land. The same standard that is applied to zoning

regulations should apply to environmental regulations, and accordingly the D.E.P.'s application of the Wetlands Protection Act to Mr. Gencarelli's property effects a taking if it does not substantially advance legitimate state interests.

The Massachusetts courts failed to afford Mr. Gencarelli an opportunity to establish that the final decision of the Department of Environmental Protection on his Notice of Intent constituted a regulatory taking. Under the provisions of the Massachusetts Administrative Procedure Act, M.G.L. c. 30A § 14, "any person ... aggrieved by a **final decision** of any agency in an adjudicatory proceeding ... shall be entitled to a judicial review thereof." (emphasis added)

In Count II of his complaint, Mr. Gencarelli alleges that the D.E.P.'s failure to issue an Order of Conditions effected a regulatory taking of his property because his restoration plan would have no adverse impact on any interest protected by the Wetlands Protection Act that is rationally related to public health or safety. Since Count II of the Complaint states a cause of action under Agins v. Tiburon, judgment should have entered for Mr. Gencarelli.

The Appeals Court erroneously ruled that

> "if Gencarelli believed that the order to restore the wetland constituted a taking, he should have raised that issue in the first Superior Court action, and having failed to do so, is precluded from raising that issue now."

Before a party will be precluded from relitigating an issue, a court must determine that (1) there was a final judgment on the merits in the prior adjudication; (2) the party against whom preclusion is asserted was a party (or in privity with a party) to the prior adjudication; and (3) the issue in the prior adjudication was identical to the issue in the current adjudication. Tuper v. North Adams Ambulance Service, Inc., 428 Mass. 132, 132, (1998).

The Court failed to consider or understand that the second Superior Court case is a separate and distinct matter from the first. The first case dealt with whether there was an illegal filling of a wetland and resulted in an order to restore the wetland which included, as a first step, the filing of a restoration plan. City of Worcester v. Gencarelli, 34 Mass. App. Ct. 907 (1992). Mr. Gencarelli's disagreement with D.E.P. over the suitability of the restoration plan is the subject of the second Superior Court action.

Prior to the completion of the administrative process, it is not possible to consider whether a regulatory taking may have occurred since there is no final regulatory action to which the test established in Lucas v. South Carolina Coastal Commission, 505 U.S. 1003, (1992), can be applied. MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 351, (1980) (extent of permitted development must be known before adjudicating constitutionality of regulations).

Since the Notice of Intent which began the regulatory process was not filed until after the first Superior Court action was filed, and was not finally decided until May, 1996, three years after the Appeals Court decision affirming the result in the first Superior Court case, it was not possible to assert the regulatory taking claim in the first action. Unlike the situation in Bagley v. Moxley, 407 Mass. 673 (1990), where the plaintiff attempted to establish title to the same parcel of land by two different legal theories in two separate cases, Mr. Gencarelli had no way to know in 1989 that, in 1996, the D.E.P. would apply the "performance standards" in its regulations in such a way as to result in a regulatory taking. See Agins v. Tiburon, 477 U.S. 255, 260, (1979) (application of bylaw to particular

property effects a taking if ...(it) does not substantially advance legitimate state interests). Even if Mr. Gencarelli could have challenged the regulatory framework including the requirement that he obtain a permit in 1989, he could not assert an "as applied" regulatory taking claim until the regulatory process was complete.

The Supreme Court has consistently declined to consider unripe takings claims. See MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 351 (1986); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186, (1985); Agins v. Tiburon, 447 U.S. 255, 260, (1980). The Commonwealth of Massachusetts has adopted this same principle in its own decisions. See Wilson v. Commonwealth, 413 Mass. 352, 356, (1992). The ripeness doctrine provides that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." Williamson County Regional Planning Comm'n v. Hamilton Bank, supra at 186.

It follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final

and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes. See MacDonald, Sommer & Frates v. County of Yolo, supra at 348. Thus, it is not possible for property owners to assert a taking claim absent a final determination on the nature and extent of development that will be allowed.

While the protection of wetlands may be a legitimate state interest, Mr. Gencarelli is entitled to try to prove that the state interest is not better served by removing the fill than by allowing the area to stay as it is. See Agins v. Tiburon, 447 U.S. 255, 260, (1980); Lopes v. City of Peabody, 417 Mass. 299, 306 (1994).

Since the petitioner has been denied an opportunity to challenge the application of environmental regulations that advance no legitimate state interest, he has suffered a taking of his property interests without compensation. Accordingly, the petitioner requests that the court order Massachusetts to afford him a trial to determine his damages.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

Shelli C. Hamer
Counsel of Record

Henry J. Lane
Lane and Hamer, P.C.
100 Main Street
Whitinsville, MA 01588
(508) 234-4400
Counsel for Petitioner

APPENDIX

Supreme Judicial Court of the Commonwealth of Massachusetts

1412 Courthouse, Boston, Massachusetts 02108
(617) 557-1020

Henry J. Lane, Esquire
Lane & Hamer
100 Main Street
Whitinsville, MA 01588-0496

RE: Docket No. FAR-10437

VINCENT GENCAARELLI
vs.
DEPARTMENT OF ENVIRONMENTAL PROTECTION

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that the above-captioned Application for Further Appellate Review has been considered by the Court and is denied.

Jean M. Kennett, Clerk

Dated: March 30, 1999

To: Henry J. Lane, Esquire
Mary E. Murphy-Hensley, Esquire
Elizabeth M. Sanning, Esquire

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

97—P—1860

VINCENT GENCARELLI
vs.
DEPARTMENT OF ENVIRONMENTAL PROTECTION & another.[1]

MEMORANDUM AND ORDER UNDER RULE 1:28

In a previous Superior Court decision, affirmed by this Court in Worcester v. Gencarelli, 34 Mass. App. Ct. 907 (1993), plaintiff Vincent Gencarelli was found to be in violation of G. L. c. 131, § 40, and ordered to submit a notice of intent to the Worcester Conservation Commission containing a plan to remove the fill and restore the wetlands. This appeal arises from the commission's and DEP's rejection of Gencarelli's plan which proposed that he take no action because, he claimed, newly created wetland caused by the fill more than adequately compensated for the filled wetland area. The commission

[1] City of Worcester, intervener.

issued an order of conditions rejecting the NOI because, among other reasons, the plan did not conform with the performance standards for replication of bordering vegetated wetlands as set forth in 310 Code Mass. Regs. § 10.55(4) (b) (1) (1989). DEP issued a superseding order of conditions also rejecting Gencarelli's plan for substantially the same reasons. Gencarelli thereafter filed a notice of claim for an adjudicatory hearing and at a pretrial conference, the administrative judge ordered the parties to submit prefiled direct testimony and prefiled rebuttal testimony. See 310 Code Mass. Regs. § 1.01(8) (f) (1986). After the testimony was filed, DEP filed a motion to dismiss for, among other reasons, failure to sustain a direct case. Relying on the prefiled testimony, the administrative law judge allowed the motion to dismiss for failure to sustain a direct case. Gencarelli appealed to the Superior Court under G. L. c. 30A claiming that the administrative law judge's decision was erroneous and also claiming that

the decision constitutes a regulatory taking. The Superior Court granted DEP's motion to dismiss on the pleadings and Gencarelli appeals.

Our review of the pleadings, including the administrative record which was submitted as DEP's answer pursuant to G. L. c. 30A, § 14(4), reveals no prejudice to Gencarelli's substantial rights. G. L. c. 30A, § 14(7). Gencarelli claimed in the Superior Court that the administrative law judge erred in failing to conduct a hearing. In this case, not only did the administrative law judge have the pleadings before him, but he also had what was supposed to be the full written text of the testimony of the parties' witnesses on direct examination, all of which showed that a hearing would serve no useful purpose. Gencarelli's expert conceded that the requirement of 310 Code Mass. Regs. § 10.55(4) (b) (6) (1989), that 75 percent of the surface of the replacement area shall be reestablished with indigenous wetland plant species within two growing

seasons, had not been met. (A. 146) . As the administrative law judge noted, ten years have passed since Gencarelli filled the wetland at issue. There was no testimony that the requirement would be fulfilled within two years. Similarly, Gencarelli's expert could not testify that the groundwater and surface elevations were approximately equal to the area altered, as required by the performance standards. On its face, then, Gencarelli's evidence was insufficient to meet the replacement criteria and a hearing would have served no useful purpose. Massachusetts Outdoor Advertising Council v. Outdoor Advertising Bd., 9 Mass. App. Ct. 775, 785—786 (1980).

On appeal to this court, Gencarelli argues that he was deprived of a full and fair hearing because he was not afforded an opportunity to submit his exhibits. Gencarelli utterly fails to articulate what, if any, information would have been contained in the exhibits that was not otherwise presented in the prefiled testimony and that could have

made up for his expert's admission that the performance standards were not met. We agree with DEP that Gencarelli has failed to demonstrate any prejudice to his substantial rights from his failure to submit his exhibits, even if that failure could be attributed to the administrative law judge, which we doubt.[2]

We next turn to Gencarelli's regulatory taking claim. Gencarelli fails to cite to any authority that suggests that DEP's refusal to issue a superseding order of conditions approving a plan which it finds does not meet the performance standards for replicated wetlands can ever constitute a regulatory taking — particularly when there has been a binding Superior Court judgment, affirmed by this Court, that Gencarelli has violated the wetland protection

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[2] We note that the regulation governing prefiled testimony specifically includes applicable exhibits in the definition of prefiled testimony. 310 Code Mass. Regs. §1.01(8)(f)(1986).

act and must restore the wetland. Moreover, we view Gencarelli's taking claim as an attempt to attack collaterally the injunction issued by the Superior Court and affirmed by this Court which orders Gencarelli to restore the wetland. Gencarelli essentially claims that any decision by the DEP that would require Gencarelli to take any action to restore the wetlands constitutes a taking. If Gencarelli believed that the order to restore the wetland constituted a taking, he should have raised that issue in the first superior court action and, having failed to do so, is precluded from raising that issue now. Bagley v. Moxley, 407 Mass. 633, 637 (1990) ("The doctrine of claim preclusion makes a valid, final judgment conclusive on the parties and their privies, and bars further litigation of all matters that were or should have been adjudicated in the action.") (internal citations omitted).

Furthermore, Gencarelli fails to provide any factual basis for his claim. To the extent that he relies on his theory

that the wetlands have sufficiently regenerated, that theory has been rejected by the commission, DEP, two Superior Court judges and now this Court. His complaint contains no other factual allegations that would support a takings claim. While it is true that "[l]egal conclusions are not frowned on, if the defendant is fairly notified of the nature of the claim and the grounds on which the plaintiff relies," Minaya v. Massachusetts Credit Union Share Ins. Corp., 392 Mass. 904, 908 n.3 (1984), here, where Gencarelli failed to provide any factual basis for his claim, the Superior Court judge did not err in dismissing it.

Judgment affirmed.

By the Court
(Kass, Kaplan& Lenk, JJ.),

(Lena M. Wong)
Asst. Clerk

Entered: February 9, 1999.